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### In Tribute: Justice Anthony M. Kennedy

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IN TRIBUTE: JUSTICE ANTHONY M. KENNEDY

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Anthony M. Kennedy.



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*Leah M. Litman\**

“So how are we doing?” Justice Kennedy asked at the start of my interview.<sup>27</sup> At the time, the question seemed difficult to answer because, while the question was about the Court, the Court rarely differed from Justice Kennedy, at least in high visibility cases in recent years.

With several years’ hindsight, however, the question strikes me as altogether perfect. The question provided the Justice the opportunity to introduce his law clerks to some of the attributes I came to associate with him most — an unparalleled ability to maintain civility, even while immersed in disagreement, as well as a belief in free speech and the exchange of ideas. And my answering the question now, on the heels of the Justice’s retirement, is fitting if only because it may test the limits of those principles.

Some of the most memorable moments from the clerkship involve the lunch hour. Lunch in the Kennedy chambers involved a certain ritual — the Justice would be tempted to order takeout with his law clerks (he’d be particularly interested if it was ribs or Chinese food), instead of sticking with the boiled chicken and vegetables, or the salad and cottage cheese, as he had promised Mrs. Kennedy he would. The Justice would struggle between the two options for a little while before ultimately sticking with his promise to Mrs. Kennedy.<sup>28</sup> (He gave in and got Chinese a few times, though.<sup>29</sup>)

Once at the table, the conversation would be wide-ranging and cover topics including politics, history, art, and music, to name a few. For a

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<sup>27</sup> Apparently, he used some variant of this question in other interviews as well. *See We the People with Jeffrey Rosen: The Legacy of Justice Anthony Kennedy*, NAT’L CONST. CTR. (July 5, 2018), <https://constitutioncenter.org/debate/podcasts/the-legacy-of-justice-anthony-kennedy> [https://perma.cc/ZT42-JNRK].

<sup>28</sup> That pre-lunch hour ritual was one of the rare occasions the Justice lived up to his nickname as the “swing” Justice.

<sup>29</sup> On his birthday, however, the Justice tried only one of the desserts we law clerks had made, because if he tried more, he told us, he would have to tell Mrs. Kennedy.

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recent law school graduate, talking with a Supreme Court Justice about any of those topics was surreal; having a Supreme Court Justice act like he cared what you had to say about them was mindboggling. Yet that's what Justice Kennedy did, even twenty-plus years into his time on the Court. Not only would he ask for our views on the topic du jour, but he would also tell stories about how much he had enjoyed having similar conversations with former clerks who had sat around the same lunch table before we did. He recounted story after story about those clerks. He had one anecdote about a former law clerk who had the Justice and his co-clerks in stitches over a story about a prior work experience, and another about a different clerk who did well bringing together clerks from other chambers. He also liked to share praise about former clerks who went off to great success in academia, in practice, and elsewhere.

Perhaps most importantly, the Justice told stories about law clerks who had made mistakes or disagreed with him, and how he still was fond of them anyway. Hearing those reassurances made chambers especially welcoming, since we law clerks inevitably slipped up at some point, and because we'd all disagree with the Justice on occasion, too. Although the Justice often found himself at the center of disagreement, he never really learned to sit with it, at least comfortably. He would never say when he didn't like a particular memo or draft; we just surmised as much when he failed to offer his usual forthcoming praise. And when one of us would say something a bit off (to him), he would just smile and wave it aside before quickly moving on.<sup>30</sup> Then we'd never talk about it again.

In these and other ways, the Justice was maybe just a little too nice for the world around him. His tendency to avoid conflict was even somewhat at odds with his public persona, at least the part of it that was evident from his writings. The Justice was fiercely protective of the First Amendment, including as it applied to contentious speech and speech that many (including him) found uncomfortable. That much was evident from the very beginning of his tenure on the Court. In *Texas v. Johnson*,<sup>31</sup> decided in the Justice's first full Term on the Court, the Justice provided the fifth vote to invalidate a law that made it a crime to burn the American flag.<sup>32</sup> The Justice wrote separately to explain how "difficult" it was for him to invalidate the law and what a "personal toll" it took.<sup>33</sup> The Justice did not suggest he found the case a particularly close one; his concurrence described the First Amendment as a

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<sup>30</sup> For example, it turns out I didn't share the Justice's taste in musicals.

<sup>31</sup> 491 U.S. 397 (1989).

<sup>32</sup> See *id.* at 398.

<sup>33</sup> *Id.* at 420 (Kennedy, J., concurring).

“pure command.”<sup>34</sup> He just felt it “poignant . . . that the flag protects those who hold it in contempt.”<sup>35</sup>

That kind of nostalgia often appeared in the Justice’s opinions,<sup>36</sup> but it appeared with extra flourish when the Justice wrote about the role of free speech in America. It found its way into the Justice’s opinion for the Court in *Citizens United v. FEC*,<sup>37</sup> which invalidated the federal ban on corporate in-kind political contributions.<sup>38</sup> “At the founding,” the Justice wrote, “speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.”<sup>39</sup> The Justice then used classic American iconography, rather than the *Hillary* movie actually at issue in the case, to illustrate why that should be the case,<sup>40</sup> even if it has not always been.<sup>41</sup> His opinion described how government officials once flirted with the idea of suppressing production of the movie *Mr. Smith Goes to Washington*, which depicts an idealistic Jimmy Stewart happening into a Senate seat and then exposing massive corruption in Washington.<sup>42</sup>

To the Justice, that narrative illustrated the power of ideas, as well as his firm belief that words could change the world (for the better). That belief often led him to curtail the government’s ability to censor speech. In *United States v. Alvarez*,<sup>43</sup> for example, the Justice rejected the idea that the First Amendment did not protect false speech, or lies.<sup>44</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 421. For a similar sentiment later in his career, see *United States v. Alvarez*, 567 U.S. 709, 715 (2012), stating: “[L]aws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.”

<sup>36</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”).

<sup>37</sup> 558 U.S. 310 (2010).

<sup>38</sup> *Id.* at 365.

<sup>39</sup> *Id.* at 353.

<sup>40</sup> *Id.* at 371–72.

<sup>41</sup> See, e.g., Justin Miller, *Criminal Law — An Agency for Social Control*, 43 YALE L.J. 691, 704 (1934) (describing a North Carolina law that criminalized teaching slaves to read or write). On criminal prohibitions on black literacy more generally, see JANET DUTSMAN CORNELIUS, “WHEN I CAN READ MY TITLE CLEAR”: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH (1991).

<sup>42</sup> See *Citizens United*, 558 U.S. at 371.

<sup>43</sup> 567 U.S. 709 (2012).

<sup>44</sup> *Id.* at 727–28.

“The remedy for speech that is false,” the Justice wrote, “is speech that is true.”<sup>45</sup> “[I]n a free society[,] . . . [t]he response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”<sup>46</sup>

One of the Justice’s final writings on the Court pressed a similar theme, warning of the dangers “when government seeks to impose its own message in the place of individual speech, thought, and expression.”<sup>47</sup> The Justice entreated his audience (whom he probably envisioned to be the American people) to “carry . . . onward” the lessons about “how relentless authoritarian regimes are in their attempts to stifle free speech” (the case involved a law from California) “as we seek to preserve and teach the necessity of freedom of speech for the generations to come.”<sup>48</sup> It’s a work in progress, to be sure.<sup>49</sup>

Recently, I’ve found myself wondering: what if (some) words are part of the problem? And what if (some) words are not enough to fix them? One of the occasions for those thoughts was the Justice’s concurrence in *Trump v. Hawaii*,<sup>50</sup> which offered a gentle reminder that it is “imperative” and an “urgent necessity” that officials “adhere to the Constitution.”<sup>51</sup> The Justice voted to reverse the lower courts’ injunction against President Trump’s ban on entry into the United States by nationals of several Muslim-majority countries.<sup>52</sup> The ban came after the President’s campaign promise of a “total and complete shutdown of Muslims entering the United States.”<sup>53</sup>

The Justice’s concurrence in *Trump v. Hawaii* contained his last words on the Court, and in some ways, it is fitting that he went out on

<sup>45</sup> *Id.* at 727.

<sup>46</sup> *Id.*

<sup>47</sup> Nat’l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

<sup>48</sup> *Id.*

<sup>49</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 3:42 AM), <https://twitter.com/realDonaldTrump/status/917701841466593280> [<https://perma.cc/22YT-CXK3>] (“With Jemele Hill at the mike, it is no wonder ESPN ratings have ‘tanked,’ in fact, tanked so badly it is the talk of the industry!”); P.R. Lockhart, *Jemele Hill, Known for Anti-Trump Tweets, Is Leaving ESPN’s SportsCenter*, VOX (Jan. 26, 2018, 5:08 PM), <https://www.vox.com/2018/1/26/16936812/jemele-hill-espn-sportscenter-departure-trump-tweets> [<https://perma.cc/L846-A6NB>]; Daniel Trotta, *Bowing to Trump, NFL Will Require Players to Stand for Anthem*, REUTERS (May 23, 2018, 12:47 PM), <https://reut.rs/2uPnkXH> [<https://perma.cc/VP34-NZD8>].

<sup>50</sup> 138 S. Ct. 2392 (2018).

<sup>51</sup> *Id.* at 2424 (Kennedy, J., concurring).

<sup>52</sup> *Id.* at 2423.

<sup>53</sup> See *Trump’s Deleted “Preventing Muslim Immigration” Statement*, THE MEMORY HOLE (May 10, 2017), <http://thememoryhole2.org/blog/trump-muslim-immigration> [<https://perma.cc/4CJK-JYER>]; Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015, 7:43 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [<https://perma.cc/78UL-5TEA>].

his unshakeable faith in the power of words — in this case, his words — to redeem us. It’s a belief that he’s held for a long time, and it very much represents who he is. In a speech fifteen years ago to the American Bar Association, for example, the Justice implored the legal profession that “[n]o public official should echo the sentiments of the Arizona sheriff who once said with great pride that he ‘runs a very bad jail.’”<sup>54</sup>

That sheriff, of course, was Joe Arpaio,<sup>55</sup> the man who was convicted of violating a federal court order that directed him to stop systematically violating the Fourth Amendment.<sup>56</sup> In August 2017, President Trump pardoned Mr. Arpaio.<sup>57</sup> Other members of the Trump Administration have similarly championed the former sheriff, a man who used state power in brutal and coercive ways that often fell on the Latinx community, as a defender of the rule of law.<sup>58</sup>

Perhaps there is something of a sad irony to how this all played out. A man who valued decorum so much he practically apologized for every one of his dissents<sup>59</sup> retired during the administration of, and thus solidified the power of,<sup>60</sup> a man who began his presidential campaign by

<sup>54</sup> Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html) [<https://perma.cc/P9HN-JG2W>].

<sup>55</sup> See Seth Mydans, *Taking No Prisoners, In Manner of Speaking* N.Y. TIMES (Mar. 4, 1995), <https://nyti.ms/2JTjRvT> [<https://perma.cc/U36D-ZC5J>]; Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. TIMES (July 31, 2017), <https://nyti.ms/2vZQimn> [<https://perma.cc/SA26-KW5U>].

<sup>56</sup> See *United States v. Arpaio*, No. CR-16-01012, 2017 WL 3268180, at \*7 (D. Ariz. July 31, 2017).

<sup>57</sup> Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://nyti.ms/2vwEQx7> [<https://perma.cc/B725-Z6X3>].

<sup>58</sup> See Matthew Yglesias, *Mike Pence Hails Joe Arpaio as a “Tireless Champion . . . of the Rule of Law”*, VOX (May 2, 2018, 10:00 AM), <https://www.vox.com/policy-and-politics/2018/5/2/17309064/mike-pence-joe-arpaio-rule-of-law> [<https://perma.cc/6JJC-QZCV>].

<sup>59</sup> See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (Kennedy, J., dissenting) (“This case involves new technology, but the Court’s stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.”); *Luis v. United States*, 136 S. Ct. 1083, 1103 (2016) (Kennedy, J., dissenting) (“The reasoning in these separate opinions is incorrect, and requires this respectful dissent.”); *Zadvydas v. Davis*, 533 U.S. 678, 706 (2001) (Kennedy, J., dissenting) (“The Court having reached the wrong result for the wrong reason, this respectful dissent is required.”).

<sup>60</sup> Justice Kennedy’s name is already being used to justify the President’s misdeeds, as Republicans point to the Justice’s decision to step down as a reason not to challenge any of Trump’s misconduct. See AG Patrick Morrisey (@MorriseyWV), TWITTER (June 27, 2018, 2:56 PM), <https://twitter.com/MorriseyWV/status/1012092215970197505> [<https://perma.cc/KHL9-M5ZC>] (“Today’s Supreme Court news underscores why it was so important to support @realDonaldTrump in 2016.”); cf. W. James Antle III, *The Donald Delivers*, THE WEEK (July 5, 2018), <http://theweek.com/articles/782606/donald-delivers> [<https://perma.cc/RR4H-33MP>] (“Since Justice Anthony Kennedy announced his retirement, I have repeatedly heard some version of the following from conservatives who declined to back the Republican presidential nominee in 2016: If I had known that Donald Trump would keep his promises on judges, I would have voted for him.”); Josh Blackman, *Conservative and Libertarian Lawyers in the Era of Trump*, LAWFARE (May 29, 2018, 3:00 PM),

referring to Mexicans as criminals and rapists,<sup>61</sup> and who bragged, on tape, about grabbing women by the pussy.<sup>62</sup>

But perhaps there are some lessons here as well as some ironies. If the real threat to civil society is having the audacity to call a racist a racist or a fascist a fascist,<sup>63</sup> perhaps the “civil” thing to do is to hand that person the keys to the kingdom and ask them to play nice. It’s a relatable decision, if nothing else; I’ve come to appreciate the difficulty of calling out someone you know and perhaps like, or someone you worked with (or perhaps someone you worked for), for doing something that may enable evil, even if unintentionally, and even though they may have had (otherwise) legitimate reasons for doing so.

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In Justice Kennedy’s eyes, more speech was always a good thing — even if it was not good speech, and even if it was not speech that people wanted to hear. Perhaps it is the influence of those ideas, or just the Kennedy clerk in me, that made it impossible for me to write the piece of schmaltz that these tributes tend to be. Perhaps more fitting for the unwavering champion of free speech is a piece that speaks (some) truth to (some) power, or at least some truth with whatever power the pages of the *Harvard Law Review* afford.

Justice Kennedy’s belief in the power of words led him to do great things, and his belief in the power of civility led him to be a good person, even when others would not do the same for him.<sup>64</sup> He fiercely pro-

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<https://www.lawfareblog.com/conservative-and-libertarian-lawyers-era-trump> [<https://perma.cc/B7F7-K6HQ>] (“[T]here is nothing wrong with keeping silent because of ‘but Gorsuch.’”); Hugh Hewitt, *Turns out ‘But Gorsuch’ Was a Good Argument After All*, WASH. POST (June 27, 2018), <https://wapo.st/2AaofE6> [<https://perma.cc/UJU7-Y88T>]. Others have made a similar argument for White House officials who are involved in various administration fiascos in addition to the selection of judges. See Jack Goldsmith (@jackgoldsmith), TWITTER (Aug. 18, 2018, 1:11 PM), <https://twitter.com/jackgoldsmith/status/1030910169453080577> [<https://perma.cc/24ZY-V5W7>] (“McGahn will forever be a (deserved) hero to the conservative establishment for his role in helping select and confirm great conservative judges and justices. Everything else, it increasingly appears, is a cost of doing business.”).

<sup>61</sup> See Amber Phillips, “*They’re Rapists.*” *President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://wapo.st/2LEKBoC> [<https://perma.cc/NX3K-KFZC>].

<sup>62</sup> See *Transcript: Donald Trump’s Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://nyti.ms/2jaECZT> [<https://perma.cc/X7LN-PWVT>].

<sup>63</sup> See, e.g., Editorial Board, Opinion, *Let the Trump Team Eat in Peace*, WASH. POST (June 24, 2018), <https://wapo.st/2JRInxb> [<https://perma.cc/Z4L7-DV78>]; Nicole Hemmer, *In MLK’s Day, Conservatives Didn’t Think He Was So “Civil,”* VOX (June 26, 2018, 7:00 AM), <https://www.vox.com/the-big-idea/2018/6/26/17503088/sanders-civility-red-hen-restaurant-trump-mlk-martin-luther-king-protests> [<https://perma.cc/64QH-ZNEK>].

<sup>64</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) (describing the majority’s reasoning as “the mystical aphorisms of the fortune cookie”); *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (claiming that “the real rationale of today’s opinion” was a “disappearing trail of its legalistic argle-bargle”).



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tected the First Amendment's guarantee of free speech, and he was justifiably skeptical of efforts to suppress disfavored ideas. He recognized that constitutional protections should extend even to words that upset people, including him, and he (nicely) asked people to join him in tolerating words or ideas they could not stand.

But sometimes the best things about a person get the best of them too. Justice Kennedy believed in the power of words and of civility, perhaps sometimes to a fault. Still, the Justice's faith in those principles and their ability to redeem us even in trying times will be missed, particularly as the principles come under siege by regimes more authoritarian than his beloved California.